In The

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

NO: [redacted] 72

JOHN HENRY COLEMAN
AND OTIS STEPHENS,

PETITIONERS

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

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I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

John Henry Coleman and Otis Stephens v. State of Alabama, 211 So. 2d 917, April 23, 1968; rehearing denied May 21, 1968 (A. pp. 91-107).

Certiorari was denied by the Supreme Court of Alabama on June 20, 1968. 211 So. 2d 927.

Writ of Certiorari was granted by this Honorable Court on March 24, 1969 (A. p. 108).

II

JURISDICTION

The petitioners have been granted a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered on April 23, 1968, rehearing denied May 21, 1968. Certiorari denied June 20, 1968. Jurisdiction of this Court is invoked under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Were petitioners denied their constitutional rights when preliminary hearing was had without their being represented by counsel?

2. Did the lineup violate Constitutional rights of petitioners?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT

Petitioners were indicted by the Grand Jury of Jefferson County, Alabama, for the offense of assault with intent to murder. Represented by counsel, they entered pleas of not guilty, were tried by a jury, found guilty as charged, and sentenced to a term of twenty years in the State Penitentiary.

Petitioners filed a motion to suppress confessions and statements arising out of lineup which was heard outside the presence of a jury and the testimony is on Appendix Pages 17-82, inclusive.

Evidence showed that Detective J. L. Fordham, Jr. testified that he talked to Mr. Casey Frank Reynolds at the hospital when the latter was in great pain and couldn't describe the assailants clearly; that witness did not believe Reynolds said whether he could identify them or not (A. 21); that Mrs. Reynolds stated she did not believe she could identify them (A. 22). Witness further stated that they were looking for three young, black males from Reynolds' description.

Casey Frank Reynlods testified that he had not seen either of defendants from the night of July 24, 1966, until he saw them in the lineup at City Jail on September 29, 1966

(A. 56); that he immediately recognized Otis Stephens as he stepped inside the door and he said "That man, there, is the one; he is the one that shot me." (A. 56); that he had not been over a lineup to observe these two defendants on other occasions nor had anyone said anything about these two defendants, or who they might be, before he viewed the lineup (A. 60); that he identified John Henry Coleman; that Coleman said nothing although he asked Mr. Limbaugh to have the men in the lineup say "Get in the woods" but he was told they couldn't do that (A. 58). Witness stated on cross-examination that the men in the lineup did not step forward and say "Get down in the woods." (A. 63); that John Henry Coleman had a hat pulled down over his eyes and he had Coleman move his hat (A. 61, 62); that witness had previously identified Coleman prior to his moving his hat (A. 62).

Carl Limbaugh stated none of the men in the lineup stepped forward and said "Get in the woods" or anything (A. 67).

All of the motion to suppress dealing with statements of either of the defendants and testimony that had been adduced from conversations had by Officers Fordham and Hart were confessed (A. 45).

At the trial, the following evidence was presented:

On October 14, 1966, preliminary was had when petitioners had no attorney (A. 7, 8, 15, 16). There is no indication from the record whether the preliminary was recorded, or whether requested by petitioners to be produced.

Casey Frank Reynolds identified Otis Stephens as the one who shot him twice as he was kneeling, changing a tire

(R. p. 136) and Coleman had his hand on Mrs. Reynolds (R. p. 134); that one of the three who came over made the statement "Get in the woods. Get in the woods. All we are going to do is fuck her." (R. p. 132). Coleman had a hat on (R. p. 151) and he saw his face (R. p. 153). Witness testified that Stephens was about six feet two, 175 pounds and about twenty (R. p. 162); that John Coleman did not say the words "Get down in the woods." (R. p. 171); that he saw the faces of John Coleman and Otis Stephens on the night of the shooting (R. pp. 171-172).

Robert Steele testified he was with the defendants and John Hodge on the night of July 24, 1966, driving John Coleman's car, a 1957 red and white Chevrolet (R. pp. 177, 178); that the car gave some trouble on Green Springs Highway and he stopped and lifted the hood and leaned over the fender with his back to the road (R. p. 181); that he heard some shots behind him and he came out from under the hood hollering "I am fixing to go." (R. pp. 182, 183); that the three passengers came running back to the car and he saw Otis Stephens shoot at the man; that the man and his wife were across the road (R. pp. 183, 184); that both Stephens and John Hodge had a gun and Hodge had a bag (R. p. 85); that he drove to John Coleman's house and then caught a bus home.

Detective Hart said Mr. Reynolds identified both defendants before he made the request to have them step forward (R. p. 218, A. p. 90).

VI

SUMMARY OF ARGUMENT

1. The preliminary hearing in Alabama is not so critical a stage in the prosecution that a defendant at that point

is entitled to counsel and the absence of counsel at the preliminary did not substantially affect the rights of accused on trial.

2. The pre-indictment, pretrial lineup, conducted on September 29, 1966, when petitioners were not represented by counsel, was not, on the totality of circumstances surrounding the confrontation, so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

VII

ARGUMENT

Petitioners, in their brief, strenuously argue that the preliminary hearing should be changed and classified as a "critical stage" of the proceedings and that a person charged with an offense is entitled to counsel as a matter of right at this stage. He cites *Escobedo v. Illinois*, 378 U. S. 478, 12 L. Ed. 2d 977, entitling accused to counsel at time of questioning when a confession is being sought, *Hamilton v. Alabama*, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, entitling an indicted defendant to counsel at the critical stage of arraignment, where pleas to the charge may be made, etc.

Maryland has held the preliminary hearing to be a critical stage of the proceeding. In *White v. Maryland*, 373 U. S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193, this Honorable Court reversed a conviction based in part upon evidence that defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. This was based on the fact that pleas were made to the charge in Maryland.

An attempt to have the preliminary hearing in Texas declared a critical stage of the prosecution was disallowed in *Pointer v. Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, wherein it was held:

> "... But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the White case is necessarily controlling as to the right to counsel. . . . "

One charged with an offense may request a preliminary hearing in Alabama. The procedures for preliminary examination in Alabama are set out in Title 15, Sections 133-140, Code of Alabama 1940.

The Court of Appeals of Alabama, in affirming the judgment of the lower court in this case, now before this Honorable Court, said:

> "We are of the opinion that the differences in the procedures of the respective states as stated in the Pointer opinion, supra, are also present in the case at bar.
>
> "The purpose of preliminary hearing in Alabama is to determine whether an offense has been committed and if so whether there is probable cause for charging the defendant therewith. If there is probable cause to believe that the defendant is guilty thereof, then it is also the duty of the magistrate to fix bail if it is a bailable

offense. Code of Alabama 1940, Tit. 15, Secs. 139-140.

"Thus, the subject matter of the preliminary hearing is temporary restraint of the accused person's liberty. Its purpose is not to convict; that is the trial court's function. Nor is it to procure evidence for conviction; that is the prosecution's duty. Wood v. U. S., 128 F. 2d 265."

Petitioners in their brief on page 12 admit that the statutes of Texas and Alabama are substantially the same.

The constitutional rights of accused are not violated in not giving him a preliminary hearing. *Grace v. State,* 220 So. 2d 259.

In spite of all the reasons conjured up by petitioners to support their contentions that the preliminary hearing is a critical part of the proceeding, it is used for determining the following:

(1) Whether an offense has been committed;
(2) Whether to hold or to release the defendant;
(3) To determine bail in appropriate cases.

Since the preliminary hearing in Alabama is not a "criminal prosecution" respondent respectfully submits that there is no violation of petitioner's rights under the Sixth Amendment.

Although petitioners concede that because the lineup occurred prior to June 12, 1967, the holding in *U. S. v. Wade,* 87 U. S. 1926, as to the right to counsel at pretrial lineup does not apply, *Stovall v. Denno,* 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, they argue that the confrontation was so unnecessarily suggestive and conducive to irreparable mis-

take in identification that they were denied due process of law.

The fairness of the pretrial lineup depends upon a number of factors such as the general age, race, physical characteristics of the participants, including any body movement, gesture, or verbal statement that is required. *Pearson v. United States,* 389 F. 2d 684.

Attention is directed to pages 88 and 89 of the Appendix. It will be noted that there were six Negroes in the lineup; that approximately three were of comparable description to each defendant. Stephens was six feet two inches tall, another man was six feet tall and another five feet eleven inches; that Coleman was five feet four and one-half inches tall, another was five feet seven and another five feet eight. Coleman wore a hat pulled over his eyes. *There is nothing in the record stating that he was required to wear that hat.* All he was required to do was move the hat so his face could be seen. Casey Frank Reynolds said he recognized Otis Stephens immediately as the one who shot him (A. 56) and that he identified Coleman before he moved his hat (A. 62) and that none in the line-up said "Get down in the woods" (A. 63).

At the trial Reynolds testified he saw the faces of the two defendants the night he was shot (R. pp. 171, 172).

The courtroom identification was predicated upon observations and knowledge gained by the witness independently of the lineup, making this case fall within a clearly defined exception to the rule announced in the Wade case. *State v. Allen,* 251 La. 237, 203 So. 2d 705

The comparison of the case with *Palmer v. Peyton,* 359 F. 2d 199, wherein the prosecuting witness was shown the

suspect's shirt and then identified his voice without comparing it to others is without merit.

In *Crume v. Beto,* 383 F. 2d 36, Crume was *required* to wear a hat while four others did not and having him be the only one to say "This is a stick-up" was not a denial of due process when so requested by the viewing witness, after an earlier identification.

Much of petitioner's argument deals with the fact that Reynolds could not from his hospital bed in pain give a description of his assailants accurate in every aspect.

Casey Frank Reynolds was changing a tire and was bent over when shot in the neck. Still dazed, he was shot again. Without citing cases but merely applying common sense, one can readily see that it would be difficult to describe these three but he did recognize two faces (R. pp. 171, 172) and he identified the defendants in the lineup. Prior to the lineup he had stated that he wasn't sure he could identify them (A. 25).

It is noted that in *U. S. v. Wade,* 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, having men in the lineup say words uttered by the robber, put strip of tape on such as worn by the robbers did not violate their privilege against self-incrimination.

Respondent submits that there was no violation of defendants' rights in the conduct of the lineup; that Casey Frank Reynolds' in-court identification was based on identification at the scene of the crime, independent of the lineup; that the lineup was not, based on totality of circumstances, conducted in such an unnecessarily suggestive manner as to give rise to a very substantial likelihood of irreparable misidentification.

VIII

CONCLUSION

For the foregoing reasons, we submit that the petitioners were indicted, tried, convicted and sentenced properly and that the due process clause of the Fourteenth Amendment, the Fifth and Sixth Amendments to the Constitution of the United States were not violated in the trial of petitioners. Therefore, the case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of May, 1969, I served a copy of the foregoing brief and argument on writ of certiorari on one of the attorneys for petitioners, by mail-

ing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Charles Tarter
Attorney at Law
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